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3 THE COURT: Good afternoon, everyone, and
4 welcome. We'll call Case No. 2:19-cv-554. Counsel,
01:39PM 5 you're familiar to me, but why don't you take a moment
6 and make your appearances, please.

7 MS. BURNINGHAM: Good afternoon, Your
8 Honor. Kay Burningham for the plaintiff, Laura Gaddy,
9 and this is my assistant, Park Romney.

01:39PM 10 THE COURT: Thank you.

11 MR. JORDAN: Good afternoon, Your Honor.
12 David Jordan and Wesley Harward of Stoel Rives on
13 behalf of the defendant.

14 THE COURT: Terrific. Thank you. Welcome
01:40PM 15 to all of you. This is the time set for hearing on the
16 defendant's motion to dismiss, and as is almost always
17 the case, we have carefully reviewed your papers. I
18 think I understand your arguments. I've studied the
19 complaint. It's quite long, but I mean, I think I
01:40PM 20 understand the complaint and the plaintiff's theories,
21 and we have invested significant energy into trying to
22 understand what we think are the controlling
23 authorities. The parties cite a number of cases from a
24 lot of jurisdictions, and I think I have a sense for
01:40PM 25 that as well.

1 Mr. Jordan, it's the defendant's motion.
2 Do you care to begin?

3 MR. JORDAN: Thank you, Your Honor. As
4 Your Honor has noted, this is Defendant's motion to
5 dismiss. We're seeking dismissal of the complaint on
6 First Amendment grounds. I've noted for the Court in
7 our brief that it's not clear in the case law whether
8 this is really a 12(b)(1) motion or a 12(b)(6) motion.

9 THE COURT: Did the Tenth Circuit resolve
10 that question in Bryce, did it not?

11 MR. JORDAN: I think the Tenth Circuit
12 leads towards it being a 12(b)(6) motion. I don't
13 think that's entirely clear, but I want to treat it
14 that way for today's purposes. Ultimately, I think it
15 makes no difference to the outcome here.

16 And the way I'd like to begin my argument
17 today, Your Honor, is with just a brief summary of what
18 I think are some of the most instructive United States
19 Supreme Court cases arising under the First Amendment
20 in the context of the kind of fraud and intentional
21 infliction of emotional distress claims that we have
22 before us today.

23 First of all, from the Kedroff v. St.
24 Nicholas Cathedral of Russian Orthodox Church case,
25 Your Honor will recall that's a 1952 case from the

1 United States Supreme Court. And there the Court said
2 that religious organizations have "the power to decide
3 for themselves, free from state interference, matters
4 of church government as well as those of faith and
5 doctrine."

01:42PM

6 That principle dates way back to the 1870s,
7 the Watson case, with which I know Your Honor is
8 familiar, and it runs through a long line of cases.

9 Of the same sort is the Presbyterian Church
10 in U.S. vs. Mary Elizabeth Blue Hull Memorial
11 Presbyterian Church case, a 1969 U.S. Supreme Court
12 case, where the Court said civil courts cannot "engage
13 in the forbidden practice of interpreting and weighing
14 church doctrine."

01:43PM

15 And to the same effect is the Ballard case,
16 United States vs. Ballard, in which the Supreme Court
17 said in 1944, "Heresy trials are foreign to our
18 Constitution. Men may believe what they cannot prove.
19 They may not be put to the proof of their religious
20 doctrines or beliefs."

01:43PM

21 That said, I want to acknowledge from the
22 beginning that it is certainly not the law of this
23 country as laid down by the Supreme Court that
24 religious organizations are somehow exempt from fraud
25 claims, for example.

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1 The problem that we have in this case, and
2 I think where the plaintiff runs afoul of the law here,
3 is that she wants to draw a distinction between what
4 she characterizes as beliefs and facts. But that's a
5 false dichotomy and not one that's been accepted by any
6 court in this country as I read the case law. Rather,
7 the distinction seems clear in the cases that the
8 important -- the important dichotomy is the difference
9 between what is religious and what is purely secular.
10 With that thought in mind, I turn to the plaintiff's
11 complaint.

12 THE COURT: Before we do that, before we
13 surrender the case law, the defendant invokes the
14 church autonomy doctrine prominently in its papers.
15 And I'm -- I'm just now wondering whether there are two
16 separate but related -- I mean, I think there are two
17 separate but related doctrines here. Does the church
18 autonomy doctrine, that language you cited from -- you
19 may have cited it from Watson. It features heavily in
20 the Tenth Circuit decision in Bryce that the church
21 autonomy doctrine prohibits civil court review of
22 internal church disputes involving matters of faith,
23 doctrine, church governments, and policy. And there
24 are a line of cases that involve or invoke the church
25 autonomy doctrine and often it involves the Title VII

1 cases, internal disciplinary matters. It's not clear
2 to me whether the church autonomy doctrine applies to
3 just doctrinal statements or whether that's separate.

01:46PM

4 Bryce, for example, doesn't refer to
5 Ballard, and I don't know now whether Judge Tacha
6 referred to Watson. It just has me wondering if when
7 we're looking at conduct, church conduct, church
8 disputes, church governance, whether that's a separate
9 thing than church doctrine, or maybe they're related.

01:46PM

10 I mean, they are related, but are they separate?

01:46PM

11 MR. JORDAN: Well, I think they are closely
12 related. I think there are different prongs of
13 different strands of case law that flow out of the
14 First Amendment. Certainly, some of the case -- the
15 church autonomy doctrine tends to focus on the rights
16 of the church to control its own organization. But you
17 do see in the cases reference to the fact that the
18 church autonomy doctrine also allows churches to
19 determine what is their religious belief, what is their
20 orthodoxy, if you will.

01:47PM

21 And we do have a strand of cases in which
22 it is perfectly clear, I think, that the church
23 autonomy doctrine includes this conception of churches
24 have a right not to be interfered with in determining
25 what their own religious doctrine is or what their

01:47PM

1 orthodoxy is. And in that regard, I would point the
2 Court to the NLRB vs. Catholic Bishop of Chicago case,
3 a Supreme Court case out of 1979, in which the Court
4 was being faced with a question of whether the NLRB had
5 jurisdiction over certain religious schools. And the
6 NLRB sought to draw a distinction between schools that
7 it characterized as wholly religious versus partly
8 religious. The Supreme Court said you're on the wrong
9 track, NLRB.

10 And then to quote from the Court: "It is
11 not only the conclusion that may be reached by the
12 board which may impinge on the rights guaranteed by the
13 religion clauses but also the very process of the
14 inquiry leading to findings and conclusions."

15 And so I think the church autonomy doctrine
16 incorporates or includes the idea that government may
17 not intrude on the process of determining for a
18 religious -- a religious organization what its beliefs
19 are, or which are the orthodox beliefs, or which are
20 the nonorthodox beliefs.

21 THE COURT: So I think that's well stated,
22 and this language in Bryce, I think, supports that
23 conclusion. And I see now that Judge Tacha did cite to
24 Watson after this, but referring to the church autonomy
25 doctrine, Judge Tacha, in the circuit, explained that

1 it's rooted in a long line of Supreme Court cases that
2 affirm the fundamental right of churches to decide for
3 themselves free from state interference matters of
4 church government as well as those of faith and
5 doctrine.

01:49PM 6 Is the direct application then in -- well,
7 I suppose there's more than one. But one of the
8 theories that I think I understand from the plaintiff's
9 complaint, though counsel will help me correct any
01:49PM 10 misapprehension I might have, is that confronted with
11 the possibility of different explanations about certain
12 events, the church has elected at different times to
13 espouse different views. Whether that's true or not
14 true, if that were so, would that fall squarely within
01:50PM 15 the church autonomy doctrine, the decision to account
16 for religious experiences or accounts in whatever way
17 the church chooses at whatever time it wishes?

18 MR. JORDAN: I think that's very well said,
19 Your Honor, and also consistent with the reality that
01:50PM 20 churches are made up of members and over time their
21 membership changes. Their organization will have new
22 leadership, and at different times people will express
23 their own thoughts about particular religious
24 doctrines. And to say that a government should intrude
01:50PM 25 in the process of deciding at any given point in time

1 what's the orthodox view, what's the correct view of
2 doctrine is to intrude in a way that I think Judge
3 Tacha is saying cannot be done. And I want to come
4 back to the point because, of course, it's Tenth
5 Circuit law.

6 Bryce says, and I quote from Judge Tacha:
7 "Threshold" -- "The threshold inquiry is whether the
8 alleged misconduct is rooted in religious belief." She
9 couldn't draw more clearly the distinction, which I
10 think is the right one, between what she calls purely
11 secular decisions and what she calls religious belief.

12 Now, with that said, I do turn to the
13 plaintiff's complaint here and I don't --

14 THE COURT: I'm going to pull you back one
15 more time before we surrender the church autonomy
16 doctrine. Do you think that it is broad enough that it
17 also captures, I think, the subject matter in Ballard,
18 which is to say that is the church autonomy doctrine
19 implicated in the question about deciding whether
20 representations made are secular or religious, or is
21 that a separate inquiry?

22 MR. JORDAN: Well --

23 THE COURT: By that, I mean, I read Ballard
24 to say we don't test the truth or falsity of religious
25 or ecclesiastical statements or beliefs, we could even

1 call them facts, but we will review, under a different
2 standard, secular facts. Now, is that part and parcel
3 of the church autonomy doctrine, or is it separate?

01:52PM 4 MR. JORDAN: No, I think it's -- I think
5 it's part of the church autonomy doctrine, but it
6 overlaps into the more broad conceptions of both the
7 establishment clause and the free speech clause.

01:52PM 8 Now, Ballard is a mess of a case down
9 below. Procedurally it's so hard to tell what actually
10 happened in this case because at the trial court level
11 the question of whether the beliefs of the defendants
12 as a criminal case were true or false was not allowed
13 to go to the jury. And then at the Ninth Circuit that
14 decision was reversed, and the idea of the Ninth
01:53PM 15 Circuit was that the jury should have been able to
16 consider that. And the Supreme Court says clearly, no,
17 that can't be right. You can't be putting to a jury
18 the question of the truth or falsity of the beliefs.

01:53PM 19 But the bottom line to all of that is that
20 Ballard correctly recognizes that purely secular
21 representations by a religious organization are not
22 insulated from scrutiny of the law.

01:54PM 23 So, for example, I think a helpful case in
24 that regard is the Molko case which we cited to Your
25 Honor. Molko's interesting because this is one in

1 which members of a church called the Holy Spirit
2 Association had misrepresented themselves as being
3 someone other than who they were. They specifically
4 said we're not affiliated with any church. Ultimately,
5 they were held to be accountable for that, and I think
6 that's absolutely right and consistent with the law.

7 If missionaries from any church went to
8 someone's door and said, "We're here representing the
9 Red Cross and we're collecting for the Red Cross" and
10 then took money and put it in their pockets, the fact
11 that they may indeed be missionaries of some church
12 doesn't insulate them from the purely secular
13 representation that we're here on behalf of the Red
14 Cross. You can't do that. That's just a fraud.

15 But it's equally true that every religion
16 has the right to preach its own doctrine. That's at
17 the heart of the free speech clause. And whether
18 others agree or disagree, we would never, as the case
19 law says, put someone to the proof of the verity of
20 their beliefs or claims, whether you want to
21 characterize them as facts or whether you want to
22 characterize them as beliefs.

23 THE COURT: So too, I suppose if a stake
24 president was negotiating with Le Bus for bus rentals
25 to take members on a field trip and made

1 misrepresentations --

2 MR. JORDAN: To Wendover.

3 THE COURT: -- about something involving a
4 contract, that would fall outside of the First
01:56PM 5 Amendment protections because it's secular.

6 MR. JORDAN: Just so, let's say the church
7 had a fleet of vehicles and after renting them for
8 three years decided that they were going to resell them
9 into the used-car market, and they rolled back the
01:56PM 10 odometers and created false odometer certificates,
11 they're not insulated from that fraudulent behavior.
12 They're held to account for that behavior because
13 that's a purely secular activity.

14 And so what we really have to do is
01:56PM 15 scrutinize the plaintiff's complaint on its face and
16 make a determination whether, in Judge Tacha's words,
17 the statements are rooted in religious belief or
18 whether they are purely secular in nature.

19 And there are lots of little tangents on
01:56PM 20 which the plaintiff's claims diverge, but the essence
21 of it is three essential claims.

22 One is this: She claims that the teaching
23 that God, the father, and Jesus Christ appeared to
24 Joseph Smith in 1820 is false. It's not historically
01:57PM 25 accurate by the plaintiff's allegations. And she wants

1 to dispute it by saying that in different accounts that
2 Joseph Smith offered at different times during his
3 life, he only mentioned Jesus Christ and didn't mention
4 God, the father, as part of this vision.

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5 It's notable, I would hasten to add, that
6 this is referred to in the church as "The First
7 Vision"; that a light descended from heaven, and in
8 this column of light, Joseph Smith saw two personages.

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9 Well, if that's not rooted, in Judge
10 Tacha's words, in religious belief, I don't know what
11 else it could be. Now, I don't purport to know how
12 visions work. I don't know how they impact the rods
13 and cones of people's eyes or whether they impact the
14 rods and cones at all and somehow transmit directly

01:58PM

15 into the brain. I don't know how columns of light
16 descend. I don't know what frequency or
17 electromagnetic wavelength they operate on. I don't
18 know if they're passing through the ionosphere and the
19 stratosphere and the troposphere, and I don't know what
20 they connect to on the other end. I don't profess to
21 understand the physics of any of that. But this is
22 never portrayed as some sort of scientific analysis.

01:58PM

23 It is, in the words of Joseph Smith
24 himself, a vision, and miraculous in its character, and
25 could not be more squarely within the realm of

01:59PM

1 religious belief.

2 I can contrast that with another
3 fundamental belief universally shared by most Christian
4 faiths, and that is the bodily resurrection of Jesus
01:59PM 5 Christ. Is that a fact or is it a belief in the
6 paradigm which Ms. Burningham offers to us? Well, she
7 says facts are things that are susceptible to proof,
8 and beliefs are not susceptible of proof. I think
9 that's wrong analysis right from the start.

01:59PM 10 Well, was Jesus Christ's body resurrected?
11 If it's true, it's a fact. It happened in historical
12 time. Could we have a trial about it in this
13 courtroom? Could we put 12 ladies and gentlemen in
14 that box and put evidence before them? Could we call
02:00PM 15 on the historical testimony of the Roman soldiers who
16 guarded the tomb and said they saw his disciples come
17 and steal his body away?

18 And then the other side would put on
19 evidence to say no, the apostle saw him and recorded
02:00PM 20 their testimony of having handled his hands and feet.
21 Maybe we'll put some medical witnesses on the stand to
22 say after someone's body has been dead for three days,
23 it's medically impossible for them to resurrect. We
24 could talk about that as a distinction between fact and
02:00PM 25 belief, but that's meaningless. Just as it would be

1 absurd to think that we could put a jury in the box and
2 make a decision about that, and Your Honor could issue
3 an order saying Jesus was resurrected or he was not
4 resurrected. In the end, religious beliefs, whether
5 you characterize them as fact or not, must forever
6 remain in the realm of faith, and as such are excluded
7 from scrutiny by the courts for the very reasons I have
8 suggested.

9 Ms. Gaddy's next central complaint is
10 that --

11 THE COURT: Before you -- before you leave
12 the example that you just gave, I've been thinking of
13 another and trying to square it. What do we think
14 of -- especially if we think of the old testament or
15 other religious texts and we think about parable. Is
16 there any applicability of parable to religious text
17 and doctrine?

18 MR. JORDAN: Well, it's an interesting
19 question, and I would answer it this way: Parables are
20 typically put forward by religious teachers as an
21 analogy to some eternal principle. You might have the
22 parable of the new -- of the good Samaritan, a parable
23 taught by Jesus during his lifetime. Now, he wasn't
24 purporting to tell a historical fact about a man
25 walking down the road and seeing an injured person by

1 the wayside and giving him assistance. He was offering
2 it as an example of the way that people should conduct
3 their lives and as a criticism of those who thought
4 that someone from Samaria was beneath people who were
5 from Israel.

6 So whether he taught it by a specific
7 example that he knew of or whether he taught it just as
8 a parable, as an analogy, I don't know. There are lots
9 of teachings in the Old Testament which some people
10 would say that's just a parable. That's just an
11 analogy. I don't want to accept that as fact. So I
12 think we could find among the many Christian
13 denominations differences of opinion about whether
14 Moses actually parted the Red Sea.

15 I think we could find many people who could
16 sit in that jury box and say I absolutely believe it
17 happened in a historical way by some miraculous means
18 that I do not understand. And we would find others who
19 would sit in that jury box and say I don't take that to
20 be literal. I take that to be an analogy for the fact
21 that God gave assistance to the children of Israel so
22 that they could escape bondage and live their religion
23 in another land.

24 But which is the orthodox Christian view?
25 Not for us to say; not for me to say; not for the

1 courts of the United States of America to say. Because
2 as -- as we read, the decision about whether or not men
3 can believe what they cannot prove is left to each
4 individual. So that's how I would respond to Your
5 Honor's, I think, important question about the
6 difference between parable and historical fact.

7 The second principal complaint that Ms.
8 Gaddy has is that Joseph Smith, according to her, did
9 not translate the Book of Mormon by the power of God,
10 but this is sort of a quibble in my view. She doesn't
11 like the use of the word "translate" because for her,
12 translation must be limited to the process by which
13 someone who is educated in two languages can read the
14 source language and render it into the target language
15 as if I were a fluent speaker of French, I might be
16 able to translate Les Misérables into English. Now,
17 unfortunately, I'm not, but Joseph Smith never claimed
18 to be conversant in reformed Egyptian. His statement
19 was and always was that he translated the Book of
20 Mormon by the power of God. What does that mean in
21 terms of the physics, the process by which that
22 happened? I have no idea.

23 THE COURT: I'm not sure that I think --
24 that I agree with the way that you have framed the
25 second complaint. I read it to be a little different

1 than that. I think -- maybe I'm being overly
2 simplistic. I think Ms. Gaddy's complaining that the
3 alleged misrepresentation here is that the church has
4 for many decades now represented it was a translation
02:06PM 5 from golden plates, and, in fact, the church knows and
6 believes that it was through the use of a seer stone in
7 accordance with Joseph Smith's original accounting and
8 third-party accounts. And so it's a misrepresentation
9 of the manner of the translation is how I think I
02:06PM 10 understand the theory.

11 MR. JORDAN: Well, let me say a word about
12 that.

13 THE COURT: Whether it was inspired by God
14 one way or the other.

02:06PM 15 MR. JORDAN: Right. I'll put it this way:
16 The belief of the church, as I understand it, is that
17 Joseph Smith was not capable of translating the plates
18 by scrutinizing the characters and in some way by
19 knowledge of the source language translating them into
02:07PM 20 the target language. But rather that he used a means,
21 a Urim and a Thummim, a seer stone, whatever you want
22 to call it, which allowed him, by the process of
23 inspiration, by the gift and power of God, to be able
24 to understand what was on the plates, dictate them to a
02:07PM 25 scribe who wrote them down. That, I think -- that's

1 how I would describe it to Your Honor.

2 But you make an important point. It seems
3 to be a quibble by Ms. Gaddy about the manner in which
4 the translation process was accomplished and what role
02:08PM 5 God or extra-natural processes like a Urim and Thummim
6 or a seer stone were instrumental in that process. But
7 once again, to use Judge Tacha's words, that's an
8 inquiry rooted in religious belief. It's not a
9 representation of a purely secular matter. And to
02:08PM 10 characterize it as anything other than something that's
11 rooted in religious belief is to just belie what's
12 before our eyes.

13 THE COURT: And would you say that if there
14 are, and I'm not saying this is true, but if it were
02:08PM 15 alleged or pled and assumed to be true at this stage
16 that there are alternative, variant descriptions of the
17 process and the mechanics, even some that are
18 inconsistent, that the church autonomy doctrine places
19 outside the review of judicial process questions about
02:09PM 20 whether the church adopts one view or another or
21 changes its view over time?

22 MR. JORDAN: That is said better than I
23 have said it, Your Honor. That's exactly right because
24 it goes back to what we talked about before. What is
02:09PM 25 the orthodox view? And it may certainly be the case

1 that different people at different times in their
2 individual beliefs hold different views of just exactly
3 what the process was. And they're absolutely entitled
4 to, and courts will not judge them for the particular
5 view of orthodoxy that they hold in their faith. So I
6 think you've said it just right.

7 I won't belabor the third point because
8 it's of the same kind. Ms. Gaddy complains about the
9 church's belief that the Book of Abraham is true
10 canonical scripture that originated in some way from
11 the Biblical prophet Abraham. Joseph Smith always said
12 that just as the Book of Mormon came by the gift and
13 power of God, so did the other scriptures that he gave
14 to the world and his believers.

15 And, again, you can quibble about that and
16 say, well, I can't connect this particular fragment
17 with what an Egyptologist says today is the
18 interpretation of some character. What we can
19 certainly say is none of that has anything to do with
20 secular matters. They're matters of faith. They're
21 matters of religious belief. They are not secular, and
22 as such, in accordance with Judge Tacha's ruling in
23 Bryce and all of the other cases that we've looked at,
24 is not for scrutiny by the courts. So if I can now,
25 I'll turn to just two final points.

1 You have before you some supplemental
2 authorities that have been submitted by the plaintiffs.
3 Improperly so because they're submitted with arguments
4 in ways that are inconsistent with the Court's rules,
02:11PM 5 but I don't want to quibble about that. I simply want
6 to point out that what Plaintiff has given to you are
7 largely RFRA cases, the Restoration of Religious
8 Freedom Act cases, which is not at issue here at all.

9 You know that RFRA cases typically arise in
02:12PM 10 the context usually in a criminal case, not always, but
11 someone is claiming that they're exempt from the
12 general application of a statute because of their
13 religious belief. This arises in some of the peyote
14 cases, for example, where people say it's part of my
02:12PM 15 religion to smoke peyote as part of a religious
16 ceremony. And in those circumstances, where a
17 generally applicable criminal statute, for example,
18 impinges substantially on the religious practice or
19 belief of an individual, they may -- they may assert
02:12PM 20 RFRA as providing them a right to be exempt from that
21 statute.

22 And in RFRA, just as in the old
23 conscientious objector cases, where people are claiming
24 an exemption from the generally applicable draft laws,
02:13PM 25 courts really look at three things. One, is there some

1 government action that is substantially burdening the
2 exercise of their religion? Two, is this really a
3 religious belief as opposed to just some philosophical
4 position? And three, is the religious belief being
5 sincerely held?

6 So when you have a RFRA case, you are going
7 to at least potentially scrutinize whether someone is
8 asserting a sincere belief in order to be exempted from
9 this generally applicable statute. That has nothing to
10 do with this case. This is not a RFRA case. It's not
11 a criminal case. The church is not asserting any
12 exemption from some generally applicable criminal law.
13 And it couldn't in this case, of course, because the
14 Flowers case said that RFRA's unconstitutional as
15 applied to the state, so state fraud law wouldn't have
16 anything to do with any of this anyway. But I just
17 want to make it clear that this is not a RFRA case, and
18 so the whole statutory concept of scrutinizing whether
19 someone's religious belief is sincerely held has
20 nothing to do with this case.

21 And then the final point I want to make
22 relates to the RICO claim here. Once again, I don't
23 understand what RICO could have to do with this case.
24 Your Honor knows that the elements of a civil RICO
25 claim are investment in, control of, or conduct of an

1 enterprise through a pattern of racketeering activity.
2 And racketeering activity, of course, is the predicate
3 act aspect of civil RICO, and it requires that someone
4 be effectively indictable for the conduct that's in
02:15PM 5 question. And that brings us back to the Ballard case,
6 which Your Honor referenced earlier, in which the
7 Supreme Court said if one could be sent to jail because
8 a jury in a hostile environment found religious
9 teachings false, little indeed would be left of
02:15PM 10 religious freedom.

11 In as much as that is the case, we couldn't
12 indict Wesley Harward or anyone else for either
13 believing or preaching doctrine of The Church of Jesus
14 Christ of Latter-day Saints. And by the same token,
02:15PM 15 because we can't indict them, their behavior in
16 believing, teaching, preaching that doctrine can't be a
17 racketeering activity. And so we can't even get back
18 past first base in RICO analysis.

19 So I conclude with this thought --

02:16PM 20 THE COURT: Well, hold that for a moment,
21 will you?

22 MR. JORDAN: Yes, sir.

23 THE COURT: If the Court -- if I agree with
24 you that the representations that form the core of the
02:16PM 25 plaintiff's complaint, the three, I'm going to say -- I

1 mean, there are statements throughout the complaint
2 about other material misrepresentations, but in the
3 complaint and in the opposition memorandum, I agree
4 with you that the plaintiff points primarily to those
5 three categories of statements that you just
6 referenced.

7 If I conclude that representations
8 concerning those matters is within the heartland of
9 religious belief and not subject to court scrutiny,
10 then all of the claims fall on that basis; is that
11 true? I mean, the racketeering claims would fall
12 because the predicate acts could not be unlawful.
13 There's no material misrepresentation for mail fraud or
14 wire fraud. Even if there was a fiduciary duty, even
15 if there were, the Court could never assess whether
16 there was a breach of it through the misrepresentations
17 and so on through each of the claims. And that's your
18 -- that's the primary thrust of your motion to dismiss,
19 is it?

20 MR. JORDAN: It is exactly the thrust.
21 You've -- you've expressed it perfectly, Your Honor.

22 THE COURT: Okay. All right. I just
23 wanted to make sure I understood that there was
24 argument in the opposition and especially then in reply
25 about other elements of RICO, but I didn't understand

1 it. And I understand you're advancing those arguments.
2 That's not in lieu of your position first stated, I
3 think, that there's no fraud in the first instance.

4 MR. JORDAN: Right. And no fraud because
02:18PM 5 you can never reach the question, which is fundamental
6 to any fraud claim or any RICO claim, and that is the
7 truth or falsity of the expression. And because you
8 cannot reach that, as Your Honor's pointed out, you
9 just never get past the first step in analyzing any of
02:18PM 10 the other matters.

11 I close with a quote from the Smith case of
12 494 U.S. 877, again, a United States Supreme Court
13 case, in which the Court said, "The free exercise of
14 religion means, first and foremost, the right to
02:18PM 15 believe and profess whatever religious doctrine one
16 desires."

17 Thank you, Your Honor.

18 THE COURT: Thank you, Mr. Jordan.

19 Ms. Burningham, you have a different view
02:19PM 20 of things, I think.

21 MS. BURNINGHAM: Yes, Your Honor. Thank
22 you. May I approach?

23 THE COURT: Would you, please.

24 MS. BURNINGHAM: Your Honor, I think Mr.
02:19PM 25 Jordan makes an argument that is very simple, and I

1 don't think it's that simple. I don't think the law is
2 that simple. I'm sure you've studied constitutional
3 law more than any of us have, and we know that
4 historically there have been a lot of cases whether in
5 the freedom of expression part under the First
6 Amendment, or the establishment portion, and the cases
7 decided thereunder, including Lemon and entanglement,
8 they're different aspects of the First Amendment
9 protection. And all these are being claimed by the
10 defendant as an affirmative defense and so they have
11 the burden to show that they fit within this.

12 Now, the church autonomy doctrine is a
13 relatively new thing that has sort of come -- I believe
14 it fits under establishment; that we don't want the
15 government impinging upon the church's right to do what
16 it wants. But if you look at the cases under the
17 church autonomy doctrine, they basically fall into
18 maybe three different types of cases.

19 You have the cases where somebody is trying
20 to -- wants a position, such as Gonzalez in the
21 Archbishop of Manila, where he felt like, I think it
22 was in a will, he was devised -- his family was devised
23 the position of archbishop, and yet in interior
24 decisions made by the church, they decided no, he
25 doesn't get it. The Court was brought into the lower

1 court in Manila, and said, well, he should get it. It
2 was overturned by the Supreme Court of the Philippines.
3 And would you like that cite, Your Honor?

4 THE COURT: I'm with you.

02:21PM 5 MS. BURNINGHAM: Okay. And so that's the
6 ministerial exception, and that has been applied and
7 expanded to include and disallow claims under -- EEOC
8 claims, and we know that.

9 The next type of decision under the church
02:21PM 10 autonomy doctrine is a decision where it involves the
11 expulsion or excommunication of members, and the rules
12 and the guidelines there because they are completely
13 within the church's polity let's say. Catholic
14 Churches and other churches have significant and
02:21PM 15 detailed inner judicial processes. The Mormon Church
16 doesn't have a similarly complex and specified interior
17 judicature for lack of a better word. It does have
18 some for excommunication. It has its own process.

19 But we are talking about something that's
02:22PM 20 now affecting people outside the church. If a
21 missionary goes outside in a different country or even
22 in the United States and preaches, as was done as we
23 cited as one of the predicate acts in RICO, that Joseph
24 Smith translated from gold plates, and this is what he
02:22PM 25 had, and this is the Book of Mormon, that's something

1 that's not just affecting the church and the body of
2 the church. It affects people who rely upon that
3 statement and may join the church because they think,
4 oh, there are records that were found, and Joseph Smith
5 translated these through some ancient language called
6 reformed Egyptian. That's a lot different than if he
7 found a seer stone, and the missionaries preached, oh,
8 yeah, I was looking at a seer stone in a hat. And that
9 may not make a difference to everybody, but it
10 certainly is a fact that could make a difference to a
11 number of people.

12 And it's our position that Ballard and
13 progeny, including Bryce, they limit -- they limit the
14 misrepresentations, or they limit what -- when the
15 Court cannot be involved in religious cases to belief
16 and doctrine but not two things that can be proven in a
17 manner that is secular.

18 And for an example, I'll read from the Van
19 Schaick case, and that was a District Court case, a
20 Scientology case in Massachusetts, even though it
21 involved a Scientology case of California. And in that
22 case, one of the misrepresentations that the plaintiff
23 was claiming that -- that the church had made was -- or
24 that an agent of the church had made was that during
25 auditing, the auditing procedure, which granted is a

1 doctrinal belief of Scientology, in going clear, you
2 need to be audited, and that is someone in the
3 Scientology religion will speak to you and talk about
4 your prior experiences in an attempt to make you clear
5 and make you free from past engrams.

6 So one of the allegations was that
7 Scientologists represented that auditing will make you
8 healthy and happy, and there is scientific evidence of
9 that. And what the Court stated was that -- excuse

10 me -- that statements -- the holding was statements
11 citing science as their source may provide a basis for
12 a fraud action even though the same contention would
13 not support such an action if it relied on religious
14 belief or its authority. That's what we've got here.

15 We've got sources of verification outside belief. We
16 have with regard to one, two, and three, let me go
17 through them.

18 On one, the misrepresentation is the
19 misrepresentation not as counsel has characterized
20 it --

21 THE COURT: Wait. I'm sorry.

22 MS. BURNINGHAM: Sorry. Go ahead.

23 THE COURT: Before you move on, it seemed
24 like you just made a leap in your argument.

25 MS. BURNINGHAM: Okay.

1 THE COURT: And I want to make sure I'm
2 following. In that Scientology case, I mean, setting
3 aside the questions in that case about whether
4 Scientology was a religion in the first instance, the
5 discussion was about the subject matter of the
6 representation and the fact that the representation --
7 the church's representation was that it was
8 scientifically supported, this notion.

9 MS. BURNINGHAM: Right.

10 THE COURT: And that's what distinguished
11 it from being religious or ecclesiastical in nature,
12 and that's why the Court could review it. Is it not
13 the nature of the representation?

14 MS. BURNINGHAM: Your Honor, I know that
15 distinction has been made historically between
16 religious -- in a religious context versus a secular
17 context, but I don't think that that is the limit. I
18 don't -- I just think that cases have not come up that
19 have been on point that are analogous to the type of
20 case we have, and let me show you an example, if I can.

21 THE COURT: But wasn't that the whole point
22 in the Van Schaick decision that you were just citing?

23 MS. BURNINGHAM: I think that was the
24 holding, but I also think that the author of the
25 decision made the point that the jury has to decide

1 whether if there's other sources of verification, then
2 that takes it out of the belief that is covered in the
3 church, out of the limits of belief.

4 THE COURT: How does it? I mean, to Mr. --
02:26PM 5 would you address Mr. Jordan's argument from -- and it
6 was restated here. I thought it was laid out well in
7 his papers. All of the briefing in this case was
8 extraordinary, I thought. But let's use the example of
9 Noah's ark. I mean, are we going to put to a jury the
02:27PM 10 question about whether two-by-two Noah gathered all of
11 the species on the planet and put them on a boat and
12 that there was a flood for 40 days? I mean, will we
13 put on scientific evidence to prove or disprove a
14 tenant of religious doctrine?

02:27PM 15 MS. BURNINGHAM: No, Your Honor, no, we
16 wouldn't. Those things have to be taken on faith.
17 It's too late. Time has past, and we're not going to
18 do that.

19 THE COURT: So is this a matter of the
02:27PM 20 availability of additional information here? Is that
21 the distinction you are --

22 MS. BURNINGHAM: In part. Yes, Your Honor,
23 in part. But it's also a matter of admissions by the
24 church. The church has now admitted that it was a seer
02:27PM 25 stone. And I quote from the essay on the seer stone,

1 that most evidence -- I'd like to read this, if you
2 don't mind.

3 THE COURT: Go ahead. Just, please, not
4 too fast for our court reporter who's trying to keep
5 up. Thank you.

6 MS. BURNINGHAM: Oh, sure. I'm quoting
7 from the LDS essay on the seer stone: "Most of the
8 accounts speak of Joseph's use of the interpreters or
9 the seer stone." Some accounts indicate Joseph studied
10 the characters on a plate. And the previous language,
11 when it was first published, was that the best evidence
12 was that the seer stone was used, even though Joseph
13 Smith only said the gift and power of God.

14 So what we have here is we have evidence
15 that is not religious evidence. It's not just, well,
16 we believe that Joseph Smith used the plates. We now
17 have the fact. And this is going to maybe be a little
18 bit out there, but if you -- just in a general quantum
19 mechanics type of thing, okay, area, we have the
20 quantum foam, or we have all possibilities laid out
21 here. And at some point, there is a point of
22 decoherence when what is possible, what is believed
23 becomes what is or what is a fact or what is
24 established, and that's what we have now here. The
25 church has admitted and it has established that it was

1 the seer stone that they have hidden from the members
2 since it was brought over in 1947 with the pioneers
3 that was the method of creation of the Book of Mormon,
4 not that it was a translation from plates.

02:29PM

5 THE COURT: Suppose there are conflicting
6 accounts of historical events, including the
7 crucifixion of Christ.

8 MS. BURNINGHAM: Mm-hmm.

02:29PM

9 THE COURT: Where does mystery and faith
10 fall within religious doctrine, and what role do courts
11 have in adjudicating different accounts of events?

02:29PM

12 MS. BURNINGHAM: I understand, Your Honor.
13 I understand your concern. And I guess the way I would
14 address it is that you ask a very good question about
15 where there was some statement, and it may have been
16 from Mr. Jordan, about how RFRA limits and applies
17 sincerity of belief in order to get out of a certain
18 regulation or statute.

02:30PM

19 What the church is doing here is claiming
20 belief that in order to get out of common law fraud or
21 any kind of wire fraud or mail fraud, they think that
22 they should be exempt from that. And in order to do
23 that, they have to show that it affected -- that it
24 would seriously impinge on their religious beliefs. I
25 have yet to hear what belief, what it is that we would

02:30PM

1 be hurting if we were to pursue a claim for fraud
2 against the church.

3 THE COURT: Well, I think the defendant's
4 position and the concern I read espoused by courts over
02:30PM 5 time is the state doesn't belong in adjudicating the
6 truth of religious beliefs. And they are premised, of
7 course, on facts, which is why I think I share Mr.
8 Jordan's view about the distinction in the case as
9 being between secular facts and religious facts as
02:31PM 10 opposed to facts and beliefs. Because I don't -- I
11 agree with him, and maybe I missed a citation in your
12 argument, suggesting that the correct standard is fact
13 versus belief. Those seem too intertwined to me. We
14 could have proven whether Christ died on a cross. We
02:31PM 15 could have proven whether he was resurrected.

16 MS. BURNINGHAM: Right.

17 THE COURT: Any of the things in the Bible,
18 they're facts.

19 MS. BURNINGHAM: But once the proof is
02:31PM 20 there, as it is now, with the admissions by the church,
21 we've got the proof.

22 THE COURT: Wouldn't you say even based on
23 the allegations in the complaint, that what -- I think
24 what you've set out are alternative explanations for
02:31PM 25 events. Does the church autonomy doctrine provide

1 religious institutions liberty to choose from among
2 alternative explanations and even change their -- even
3 change their official policy or doctrinal positions
4 about things?

02:32PM 5 MS. BURNINGHAM: They should. But in this
6 case, the church has had a correlation committee under
7 the Church Educational System since the mid-20th
8 century and what that -- what that department has done
9 is that it has consistently obfuscated and

02:32PM 10 misrepresented the facts of how these things came
11 about. They've admitted now in the Book of Abraham
12 that even church Egyptologists, even Mormon
13 Egyptologists are now saying that Abraham is not
14 depicted in any of the facsimiles even though we still

02:32PM 15 have the Book of Abraham as scripture. It still is
16 taught in student manuals. We still have sketches of
17 facsimiles that say this is Abraham laying on the
18 throne or sitting on the throne of Pharaoh when it's,
19 in fact, Isis or Osiris or an Egyptian -- part of a

02:33PM 20 funerary document. We have these misrepresentations
21 that are now admitted in the Book of Abraham essay, if
22 I may read from that, Your Honor, and I'll try to be
23 slow.

02:33PM 24 THE COURT: I want you to do that, but will
25 you -- I'm going to do the same thing I did to Mr.

1 Jordan, and I'm going to pull you back for a moment.
2 Did you answer my question? Does the church autonomy
3 doctrine provide our religious institutions with
4 autonomy to make decisions among competing accounts or
02:33PM 5 beliefs and even to change those beliefs over time?

6 MS. BURNINGHAM: Yes. But when there is
7 evidence of a deliberate intent to hide the truth of
8 how a church was formed or the origins of scripture,
9 that is fraud. And that is -- and in being able to
02:33PM 10 protect the citizens of the state against something
11 like that is a compelling interest of the state. And I
12 don't think that any of the cases hold that a church,
13 if it knowingly and intentionally hides or
14 misrepresents facts about its origins or its scripture,
02:34PM 15 that they are exempt.

16 THE COURT: Hold on.

17 MS. BURNINGHAM: Okay.

18 THE COURT: Hold on. I mean, we should get
19 to the Book of Abraham for sure, but --

02:34PM 20 MS. BURNINGHAM: Okay.

21 THE COURT: -- let me just -- this is from
22 the Supreme Court. You're familiar with the Ballard
23 decision of course. You cited it and relied on it.
24 Both parties are -- we're all versant in it.

02:34PM 25 Speaking about religious freedom, the

02:35PM

02:35PM

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02:36PM

1 freedom to believe and the freedom to act, especially
2 the freedom to believe, the Supreme Court said this
3 freedom embraces the right to maintain theories of life
4 and of death and of the hereafter which are rank
5 hearsay -- or heresy, rather, to followers of the
6 orthodox faiths. Heresy trials are foreign to our
7 Constitution. Men may believe what they cannot prove.
8 They may not be put to proof of their religious
9 doctrines or beliefs. They may not be put to proof of
10 their religious doctrines or beliefs. Religious
11 experiences which are as real as life to some may be
12 incomprehensible to others. Yet the fact that they may
13 be beyond the ken of mortals does not mean that they
14 can be made suspect before the laws. Many take their
15 gospel from the New Testament. But it would hardly be
16 supposed that they could be tried before a jury charged
17 with the duty of determining whether those teachings
18 contained false representations. The miracles of the
19 New Testament, the divinity of Christ, life after
20 death, the power of prayer are deep in the religious
21 convictions of many. If one could be sent to jail
22 because of a jury -- excuse me -- because a jury in a
23 hostile environment found those teachings false, little
24 indeed would be left of religious freedom. And then
25 the Court goes on to say man's relation to his God was

1 made no concern of the state.

2 How do we get past the language from the
3 Supreme Court, which is binding on me, to testing the
4 veracity of allegations based on competing evidence
02:36PM 5 that may exist? I assume, because we're in a Rule 12
6 posture, the truth of the well-pled factual
7 allegations, but how do I get beyond that language?

8 MS. BURNINGHAM: Because everything you
9 just read, Your Honor, has to do with beliefs and
02:36PM 10 doctrine, and they're not facts. And I know that the
11 distinction is they're not admitted facts. They're not
12 -- let me just compare what -- I think this will
13 illustrate this nicely.

14 THE COURT: Is it your view, then -- I
02:37PM 15 guess it must be your view that the church, and when we
16 say "the church," I think -- let's be more precise.
17 You're referring to the --

18 MS. BURNINGHAM: The Corporation of the
19 President, Your Honor.

02:37PM 20 THE COURT: Right. Which I assume has had
21 different manifestations over time. It's been
22 different people in different positions over time, and
23 we're assuming that it's one unitary --

24 MS. BURNINGHAM: Well, highly correlated
02:37PM 25 since the '50s.

1 THE COURT: Your view is, your allegation
2 is that the church simply doesn't really hold that
3 belief.

4 MS. BURNINGHAM: Yes. And that was the
02:37PM 5 second part of my argument, that it's not sincere.
6 They have -- J. Reuben Clark, in a discussion clear
7 back in -- when the correlation committee was being
8 formulated, there were two different ideas. Should we
9 go and tell the whole truth, or should we tell, as Boyd
02:38PM 10 K. Packer referenced, something that makes the little
11 grandmothers in Sanpete County happy or that assuages
12 them? I haven't quoted him exactly.

13 One is sort of a fairytale, and the other
14 is the raw, unvarnished truth, and they picked the
02:38PM 15 former. And that's what they've done for people who
16 grew up during that time. And many people relied on
17 what was taught because from correlation, it went to
18 Sunday school, priesthood, all these manuals, and even
19 to the missionary manuals and to what was taught in
02:38PM 20 institute and seminary.

21 THE COURT: Well, so let me draw you back
22 to Ballard then and see if I --

23 MS. BURNINGHAM: Okay.

24 THE COURT: -- can understand how you think
02:38PM 25 your case is different.

1 MS. BURNINGHAM: Mm-hmm.

2 THE COURT: The individuals at issue in
3 Ballard were making representations about their ability
4 to cure disease, both curable and incurable, because of
02:39PM 5 the divinity of God.

6 MS. BURNINGHAM: Right.

7 THE COURT: And the purity of these
8 individuals.

9 MS. BURNINGHAM: And they were the
02:39PM 10 incarnation of St. Germain, as I recall, or something
11 like that.

12 THE COURT: Right. That's right. And
13 that's the context of the misrepresentations at issue
14 in that case.

02:39PM 15 MS. BURNINGHAM: It's a belief.

16 THE COURT: I'm sorry?

17 MS. BURNINGHAM: I'm sorry. I just said
18 it's a belief.

19 THE COURT: That's a statement of fact, is
02:39PM 20 it not? We can cure disease. Is that a statement of
21 fact?

22 MS. BURNINGHAM: That's their belief, that
23 they can cure -- cure disease. And, Your Honor, can I
24 point you to the chief justice's dissent? I think it
02:39PM 25 will answer your question in Ballard.

1 THE COURT: Of course.

2 MS. BURNINGHAM: Okay.

3 THE COURT: Let's recognize it's a dissent
4 but sure.

02:39PM

5 MS. BURNINGHAM: Yes. This is what he
6 said. And he said: If it were shown that a defendant
7 in this case had asserted as part of the alleged
8 fraudulent scheme that he had physically shaken hands
9 with St. Germain in San Francisco on a day named, or

02:40PM

10 that, as the indictment here alleges, by the exertion
11 of his spiritual power he had in fact cured hundreds of
12 persons afflicted with diseases and ailments, I should
13 not doubt that it would be open to the government to
14 submit to the jury proof that he had never been in San
15 Francisco and that no such cures had ever been
16 effected.

02:40PM

17 Those are facts. And what I'm trying to
18 say by reading that part of the dissent is that we now
19 have proven facts, admitted facts that were hidden for
20 a century or more.

02:40PM

21 THE COURT: Hold on one moment, will you,
22 please.

23 MS. BURNINGHAM: Sure.

24 THE COURT: So the dissenting opinion is
25 not binding authority on me. The opinion of the Court

02:40PM

1 is the binding authority. The representations,
2 everyone agrees, were false in the Ballard decision,
3 the facts of that case. Specific factual
4 representations, I can cure your disease, statement of
02:41PM 5 fact, false. And the Court said it's not our place to
6 adjudicate whether that's true or false. The Court
7 said, and I'm bound by it, I mean, this isn't the
8 holding, but here's the explanation: The religious
9 views espoused by respondents might seem incredible, if
02:41PM 10 not preposterous, to most people. But if those
11 doctrines are subject to trial before a jury charged
12 with finding their truth or falsity, then the same can
13 be done with the religious beliefs of any sect. When
14 triers of fact undertake that task, they enter a
02:41PM 15 forbidden domain.

16 Is that not the domain that you're inviting
17 me to enter?

18 MS. BURNINGHAM: No, because these facts
19 have been admitted and established.

02:42PM 20 THE COURT: So is the difference that --

21 MS. BURNINGHAM: It's an exception.

22 THE COURT: -- the Ballards didn't admit in
23 the record that they knew what they were saying was
24 false?

02:42PM 25 MS. BURNINGHAM: They did at the lower

1 court, and that was allowed to be tried, and it was
2 tried. And just like in the RFRA cases, it is our
3 contention that we should be allowed to -- if Your
4 Honor wants to -- decides to grant the motion to
5 dismiss, we should be allowed to amend, to plead that
6 the church did not sincerely believe that gold plates
7 were used to create the Book of Mormon; that Joseph
8 Smith said that he saw -- not that he did see, but he
9 said or wrote that he saw two percentages, and one of
10 them said all creeds are false.

11 And, Your Honor, if I can just compare the
12 two -- two characterizations, I think this will sort of
13 bring it all together, the difference. I know it's a
14 little abstract.

15 THE COURT: I'll follow as closely as I
16 can.

17 MS. BURNINGHAM: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MS. BURNINGHAM: Mr. Jordan stated if --
20 these are both -- let's see, I don't have the page.
21 Mr. Jordan, if you could help me. I believe it's -- he
22 refers to our opposition at page 8 in his reply, and he
23 says that we make three claims.

24 THE COURT: Yes, I remember that well.

25 MS. BURNINGHAM: Do you have that?

1 MR. JORDAN: I'm not sure. Are you
2 referring to page 8 of my brief?

3 MS. BURNINGHAM: I think it is page 8 of
4 the reply as well and page 8 of the opposition on both.
5 It has three bullet points.

6 THE COURT: It was page 8, yes.

7 MS. BURNINGHAM: And mine on the opposition
8 also has three bullet points, and they're compared.

9 THE COURT: I'm with you.

10 MS. BURNINGHAM: Okay. Thank you. Reading
11 from the reply first, this is what he claims we are
12 asking the Court to do.

13 One, did God and Jesus Christ appear to
14 Joseph Smith in 1820? That is not what we're claiming.
15 That's not what we want the Court to adjudicate.

16 Now, compared to my opposition, this is
17 what I say: In 1820, as stated in Smith's own 19 -- or
18 1832 handwriting, Smith sought the Lord who forgave his
19 sins. Nothing more.

20 What we want the Court to adjudicate is
21 whether Smith's report of what he saw is what the
22 church has been telling everybody or if it was a
23 conflated, exaggerated, manipulated tale, not the truth
24 of what happened but what Joseph Smith actually
25 reported. And I apologize. I think this is the most

1 obtuse of my three points and so if I may continue on
2 the other two.

3 THE COURT: Yes. But may I ask a question
4 first?

02:44PM

5 MS. BURNINGHAM: Sure, sure.

6 THE COURT: I don't know if we'll get this
7 far. The defendants haven't argued this point, and so
8 I don't think -- I said defendants -- defendant, so
9 we're not going to reach it, I don't think, in

02:45PM

10 resolving this motion. But don't you plead that there
11 are differing accounts of the first vision even by
12 Joseph Smith himself? And so would your fraud claim
13 depend on you proving which is true and thereby
14 demonstrating the falsity of the other representations?

02:45PM

15 MS. BURNINGHAM: No, I don't think so, Your
16 Honor. The fraud claim would only prove what the
17 church has done to manipulate Smith's handwritten
18 report.

02:45PM

19 THE COURT: Well, did he account for it
20 differently in different places --

21 MS. BURNINGHAM: Yes.

22 THE COURT: -- at different times?

23 MS. BURNINGHAM: Well, he --

02:45PM

24 THE COURT: So are you depending on the
25 Court being able to adjudicate which of those accounts

1 was the true account such as it is in order to show
2 that the other --

3 MS. BURNINGHAM: No.

4 THE COURT: No?

02:45PM 5 MS. BURNINGHAM: No, Your Honor. What we
6 would be doing is, for instance, for 15 years there was
7 no mention of two separate personages or all creeds are
8 false. That was from 1820, when the first vision was
9 supposed to have occurred, until 1835. We could almost
02:46PM 10 take -- I can see discovery where we ask the church to
11 admit certain things, and then once those are admitted,
12 it's the reporting of what happened, not what did
13 actually happen. That doesn't matter. It's that the
14 church has manipulated the facts, what did happen. Not
02:46PM 15 the beliefs out here but what actually did happen.

16 THE COURT: And if I -- just to clarify a
17 point you made earlier, make sure I understand it
18 correctly, this courtroom is a suitable place to
19 adjudicate those facts, because unlike Noah's ark,
02:46PM 20 there are records that we can refer to, and now we can
21 test the truth or falsity of statements or accounts or
22 representations because of our proximity to the events.

23 MS. BURNINGHAM: In part, yes, but not
24 only. It's only where the misrepresentations rise to
02:47PM 25 fraud. Not negligence. Not we don't care. I mean, we

1 made a mistake, or we're going to do this, or we're
2 going to say that this happened instead of that. Only
3 when they rise to fraud and when there's evidence of
4 deliberate manipulation and deliberate concealment, and
5 I think we can prove that through the back door by
6 asking questions of sincerity.

7 THE COURT: Okay. You were saying this is
8 your -- did you say most obtuse example?

9 MS. BURNINGHAM: Yes. I apologize. It was
10 number one. But that is one that many people rely on
11 for joining the church, that all creeds were false.

12 So the next one, Mr. Jordan says, is we
13 asked the Court to prove, quote, and this is from page
14 8 of the reply, "Did Joseph Smith translate the Book of
15 Mormon by the power of God?"

16 That's not what we're asking. We're
17 asking, and reading from my reply on page 8, "The Book
18 of Mormon was not translated from an ancient record but
19 was created while Smith peered at a stone in a hat, the
20 same stone he had previously used for scrying."

21 That's the admission. That's what the
22 church has admitted in the gospel essay. It seems
23 easy. It doesn't seem like we'll have to have a lot.

24 And then the third item that we've claimed
25 from Mr. Jordan's reply: "Is the Book of Abraham true

1 scripture from the Biblical prophet Abraham?"

2 And from our opposition: "The Book of
3 Abraham was not written by the Hebrew prophet. The
4 papyrus recovered in '67 from Smith was said to have
02:48PM 5 translated the words of Abraham as a common Egyptian
6 funerary document which does not mention Abraham."

7 And if right now I can just go to the essay
8 that I wanted to quote before since there's kind of a
9 segue here, Your Honor, may I? Okay.

02:48PM 10 THE COURT: One moment, please.

11 MS. BURNINGHAM: Sure.

12 THE COURT: Matters involving visions of
13 God, they're religious in nature, are they?

14 MS. BURNINGHAM: Yes.

02:49PM 15 THE COURT: Matters involving the origin of
16 doctrinal texts are inherently religious in nature, are
17 they?

18 MS. BURNINGHAM: No. I don't think that
19 always is true, no. The Dead Sea Scrolls -- the Dead
02:50PM 20 Sea Scrolls -- I'm sorry.

21 THE COURT: The origin of a religious text
22 is not a religious question, not a religious --

23 MS. BURNINGHAM: Well, it could be, but I
24 don't think it necessarily is.

02:50PM 25 THE COURT: Who decides that?

1 MS. BURNINGHAM: Well, ordinarily the
2 church stays out of that stuff -- well, no, actually,
3 excuse me, Your Honor, let me just be clear. I think
4 that there is case law that states that the Court is
5 the one who decides whether it's a religious issue or
6 not a religious issue, an issue of religious belief or
7 not. And I would -- I would argue that these are not
8 any longer issues of religious belief because they are
9 now facts that have been admitted. They're not in that
10 anything's possible type of realm anymore. They've
11 been established and admitted.

12 THE COURT: So just a judge decides
13 whether -- let's just assume that the representations
14 are facts concerning Christ. Facts concerning Christ.
15 Any judge in a robe in a courtroom would decide whether
16 those representations relate to belief and religion or
17 are facts about something else?

18 MS. BURNINGHAM: No, I don't think so. I
19 think this case is very narrow, and it's only where the
20 church has admitted the truth of something that it
21 previously had not.

22 THE COURT: We are talking past each other.

23 MS. BURNINGHAM: Okay.

24 THE COURT: What if the church took
25 different -- let's use a different example. No, let's

1 not. There's no need, I don't think, for a
2 hypothetical. Let's suppose the defendant, at
3 different times, made different statements about Joseph
4 Smith's first vision, an inherently religious
5 experience.

02:52PM

6 MS. BURNINGHAM: Yes.

7 THE COURT: I decide whether those are
8 matters of religion or whether they're not based on
9 what? You keep referring to statements of fact. Give
10 me factual statements about what Joseph Smith saw, or
11 what he said, or what he said about what he saw, or
12 what others said he said about what he saw, it's all
13 about a religious matter, a vision involving God. And
14 I would decide that that's not a religious matter
15 applying what test?

02:52PM

02:52PM

16 MS. BURNINGHAM: No. It is a religious
17 matter, but it's not -- but we have -- Your Honor, we
18 have -- I don't think the case law that holds something
19 is religious, if it's in a religious context, we can't
20 touch it versus a secular context, well, then we can
21 enter into it. Once things have been established, that
22 difference doesn't make any sense anymore.

02:53PM

23 THE COURT: But in the language of the
24 Supreme Court, again, going back to Ballard, and this
25 is different language, when considering the truth or

02:53PM

1 falsity of the statements made by the Ballards,
2 religious claims, the Supreme Court said we do not
3 agree that the truth or verity of respondent's
4 religious doctrines or beliefs should have been
5 submitted to the jury. Whatever this particular
6 indictment might require the First Amendment precludes
7 such a course.

8 Isn't the whole point, isn't that whole
9 discussion we're not in the business of deciding the
10 truth or falsity of religious statements?

11 MS. BURNINGHAM: Of religious beliefs, Your
12 Honor.

13 THE COURT: Okay.

14 MS. BURNINGHAM: I see the difference you
15 don't see -- I mean, I understand how that has not been
16 addressed clearly in the case law, especially not in
17 the Tenth Circuit, but that's an open question. But if
18 I could just read from the Book of Abraham real quick.

19 THE COURT: Thank you.

20 MS. BURNINGHAM: This is the admission in
21 the Book of Abraham essay: "None of the characters on
22 the papyrus fragments mentioned Abraham's name or any
23 of the events recorded in the book," the Book of
24 Abraham. "Mormon and non-Mormon Egyptologists agree
25 that the characters on the fragments do not match the

1 translation given in the Book of Abraham. Scholars
2 have identified the papyrus fragments as part of a
3 standard funerary text that were deposited with
4 mummified bodies. These fragments date to the third
5 century B.C. and the first century C.E. long after
6 Abraham lived."

7 We've got facts now that have been
8 admitted, so I'll move on, Your Honor, if that's all
9 right, unless you have some more questions about this.

10 THE COURT: No, that's helpful. Thank you.

11 MS. BURNINGHAM: Thank you. If we go back
12 to Ballard, Ballard left open the question of whether
13 the Court could appropriately decide whether the
14 defendant sincerely believed what they were claiming.

15 I believe that's the correct interpretation. I don't
16 want to overstep, but I think that was left open, and
17 that's what the lower court did, in fact, do. And they
18 found that the Ballards didn't sincerely believe what
19 they taught, whether it's characterized as a fact or a
20 belief. And it is a complicated history, the Ballard
21 case, but I believe there was a conviction, one, if not
22 two, and that was based upon their beliefs.

23 Anyway, to continue with that, the Ninth
24 Circuit case I submitted called Rasheed involves
25 sincerity of belief. And it's our position that if

1 Your Honor is inclined to rule with the defense and
2 grant the motion to dismiss, that we would ask leave to
3 amend so that we can allege that COP's agents did not
4 sincerely believe what they were teaching from the
5 1950s, the time of correlation, until the gospel essays
6 were recently published, and that that lack of sincere
7 belief is evidence of fraud. In the general sense of
8 the wire fraud and the mail fraud statute, intention to
9 deceive is all you need. It's not the same with common
10 law fraud. And I do think that even given the elements
11 of common law fraud, number one, a misstatement of fact
12 which is false, and, yes, how do you prove that, but
13 that the defendant knew to be false or believed
14 recklessly or said recklessly without sufficient proof.

15 I believe that we can show, through various
16 bits of evidence, most of which is in the control of
17 COP, that the church's leaders, the agents of COP did
18 not believe what they were teaching, and that that's
19 why they came out with the gospel essays because they
20 felt like it was about time to come clean. And that
21 insincerity of belief, that lack of belief is evidence
22 of fraud on their part, and that we should be able to
23 prove that.

24 And the Ninth Circuit Court case of Rasheed
25 did just that. It's the Ninth Circuit Court of Appeals

1 case and Rasheed had the Church of Hakeem. Rasheed is
2 the named defendant. He was the leader of the Church
3 of Hakeem. And they had a program, they characterized
4 it as a belief or doctrine, called the "Dare to be
5 Rich" program where they -- if you don't mind me just
6 briefly summarizing this, Your Honor, where they taught
7 potential investors or members of their church to give
8 money and that if they believed, that God will make the
9 money grow, when, in fact, there was no investment and
10 it was just a Ponzi scheme.

11 And the Court convicted these men on mail
12 fraud, the federal statute that's a predicate act in
13 RICO, and found that they were not credible; that they
14 did not believe what they told them. And this involved
15 doctrine, a claimed doctrine by the Church of Hakeem,
16 that God will provide, and yet the Court convicted him
17 on fraud. And the language in Rasheed is very helpful
18 here, if I may read briefly from it, Your Honor.

19 THE COURT: Thank you.

20 MS. BURNINGHAM: Speaking about the verdict
21 in the lower court: The evidence is sufficient that a
22 jury could find beyond a reasonable doubt that Rasheed
23 and Phillips engaged in conduct --

24 THE COURT: I'm sorry, Ms. Burningham, if
25 you could slow down a little bit, please. Our court

1 reporter can't possibly keep up.

2 MS. BURNINGHAM: Am I too fast?

3 THE COURT: You are when you're reading.

4 Thank you.

02:58PM

5 MS. BURNINGHAM: Okay. The evidence is
6 sufficient that a jury could find beyond a reasonable
7 doubt that Rasheed and Phillips engaged in conduct that
8 they knew was deceitful. They made representations
9 concerning the source of the increased funds and
10 concealed the true source of those funds.

02:59PM

11 Just like Gaddy, in our case, they made
12 representations that -- COP made representations that
13 the scriptures were translated from gold plates when
14 the source of the scripture was, in fact, a seer stone.

02:59PM

15 Quote, and here's an aside, "Concealment of
16 a material fact is fraud within the scope of the mail
17 fraud statute." And then going on, "They both
18 continued to operate the program over a period of time
19 with knowledge of their failure to disclose the true
20 source of the increased funds. This intentional
21 misrepresentation created valuable undo advantage for
22 them, and thus was a scheme or artifice to defraud
23 within the meaning of the mail fraud statute."

02:59PM

24 The Ninth Circuit concluded that the
25 verdict should be upheld and that fraudulent intent may

03:00PM

1 be and is often proved by circumstantial evidence
2 including no sincerity of belief in what they're
3 preaching.

4 One more quote, Your Honor: "The principal
03:00PM 5 evidence of the fraudulent nature of the program, and
6 of Rasheed's and Phillips' knowledge of the deceit, is
7 the false impression they created concerning the source
8 of funds for the payments of the increase."

9 I think that's good enough. So I realize
03:00PM 10 that's the Ninth Circuit, Your Honor, and I guess I
11 would just say that I don't think that the RFRA cases
12 where we have in the Tenth Circuit, and these are some
13 of the cases I submitted to you recently, where we have
14 sincerity tested, and that can be done in the Tenth
03:01PM 15 Circuit. I think we can test it in a case like this.

16 If the church, regardless of the truth of one, two, and
17 three of what Joseph actually wrote down versus what
18 may have been manipulated by COP, whether it was the
19 stone or not, whether it was the stone or gold plates,
03:01PM 20 or whether the Book of Abraham is mentioned or not in
21 the papyrus, regardless of that, let's put that aside.

22 If we can show that the agents, the leaders, those who
23 are directly in control of the correlation committee
24 didn't believe it, and we have evidence that they
03:01PM 25 didn't because why would they hide the stone? Why

1 would they lock it up, like Grant Palmer said, and not
2 let anybody see it until August 4, 2015? If we have
3 evidence that they did not have a sincere belief in
4 what they were preaching, then we can show fraud, at
5 least in a general sense. And I don't think that they
6 can have it both ways to characterize these three
7 things that I have identified as facts or as beliefs,
8 well, then, we should be able to show that their
9 beliefs were insincere.

03:01PM
10 THE COURT: Do you agree that a sincere
11 belief theory is not a theory -- you're asking about
12 potential amendment?

13 MS. BURNINGHAM: Yes.

14 THE COURT: You agree that that's not a
03:02PM 15 theory contained in your current complaint?

16 MS. BURNINGHAM: It's not, except for the
17 third allegation of fraud is that they knew to be false
18 or recklessly presented without knowing the truth and
19 falsity so indirectly. But I would plead it much
03:02PM 20 differently, and it's only that I -- it's only because
21 I'm, you know, I didn't see it the first time around,
22 but I do think that we have grounds for that. I don't
23 think it's frivolous.

24 Counsel has made a motion to me, threatened
03:02PM 25 a Rule 11 motion, they haven't filed it, but we have

1 earnest misrepresentations, and the issue is whether we
2 protect the populous against certain crimes. We do.
3 We -- do we protect them against fraud, intentional
4 fraud, intentional misrepresentation? I think we
5 should.

03:03PM 6 THE COURT: I don't know yet -- we'll
7 recess in a moment. We've been going for an hour and a
8 half, and we'll give the court reporter a chance to
9 stretch her fingers, and then we'll conclude. If --
03:03PM 10 and I'm not going to rule today. I'm going to take
11 this matter under advisement. But if the Court agrees
12 with the defendants as to the theory in the current
13 complaint and concludes that amendment would be
14 appropriate under Rule 15, how much time would the
03:03PM 15 plaintiff need to amend the allegations? 30 days? Do
16 you need longer than that?

17 MS. BURNINGHAM: 45 would be nice, Your
18 Honor, just in case.

19 THE COURT: Okay.

03:03PM 20 MS. BURNINGHAM: Thank you. I would like
21 to, when we get back, address a couple of other things.

22 THE COURT: I think there's a little --
23 there's some more work, I think, for us before we
24 conclude.

03:04PM 25 MS. BURNINGHAM: Thank you.

1 THE COURT: Why don't we take a ten-minute
2 recess and come back at quarter after three. Thank
3 you.

4 (Recess was taken.)

03:20PM 5 THE COURT: Ms. Burningham, I think you had
6 the podium.

7 MS. BURNINGHAM: Thank you, Your Honor.
8 Just a few more points.

9 THE COURT: Of course.

03:20PM 10 MS. BURNINGHAM: Your Honor, I'd like to
11 just make one more statement to maybe iron out our
12 position in response to a statement you've made, I
13 think, a few times on the record, that -- that the
14 church has had various opinions as to what happened or
03:20PM 15 as to its beliefs over time, and that we shouldn't make
16 a court of law determine which of those is true. And I
17 understand your point. But I think what we're doing is
18 something different, and what we're asking the Court to
19 do is slightly different, and these are fine

03:21PM 20 distinctions. And I can't remember the case that said
21 that it's a fine distinction between religious or
22 secular belief sometimes, but I would also offer that
23 it's a fine distinction between deciding which of
24 several versions are true. And the problem isn't that
03:21PM 25 there are many versions but that the church knows that

1 it has taught false -- false versions.

2 What the church has taught since
3 correlation is not true. They know it's not true and
4 yet they've taught it. And that's where sincerity
5 comes in. So the question before the Court is not
6 whether the church's claims are true. It's that the
7 church knowingly taught things it knew to be false.

8 It knew that since 1917 or 1912, when the
9 New York Times came out and the first Egyptologist back
10 in the late 19th century translated what was in the
11 Book of Abraham, that it was an impudent fraud. It
12 knew that, but it continues to teach these young people
13 that this is the prophet Abraham's teachings, and that
14 this shows him doing such and such a thing and doing
15 this and that. And it just flatly is not true. Even
16 its own Egyptologists say that.

17 That's a little bit different, and that's
18 where I think -- and I don't think that it's -- I think
19 the compelling state interest comes in because we have
20 a duty to protect -- the state has a duty to protect
21 people from fraud, and that's more than just lying.
22 That's something more.

23 Also, if an individual is not sincere under
24 RFA, he doesn't get the benefit of a First Amendment
25 defense or an RFA defense, freedom of expression. And

1 why should it be limited to the RFA cases? If the
2 church authorities, the general authorities who decided
3 what to teach and what to put in correlation knew that
4 their correlated manuals were not correct based upon
5 evidence that they've had for centuries or a century
6 and a half, why should we allow them to avail
7 themselves of the First Amendment defense, when an
8 individual who doesn't believe that, you know, he
9 doesn't really need to wear a beard or that, you know,
10 he wants his Bible with him, why should they be put to
11 the test, I don't understand, or that marijuana's
12 necessary? That's the question that I think is more
13 clear.

14 And when we talk about a person, Hobby
15 Lobby, as you know, came down and gave corporations,
16 even for-profit corporations the right to opt out of
17 selling contraceptives under the Affordable Care Act.
18 Well, why should we allow the corporate entity here,
19 the Corporation of the President of the Church of Jesus
20 Christ of Latter-day Saints, to opt out of common law
21 fraud or wire fraud or mail fraud? If we can establish
22 that its agent leaders did not sincerely believe what
23 they taught and we can establish the other elements of
24 fraud, that is that they were made recklessly, that
25 they knew they were false, that they intended that the

1 members and potential members would rely on those
2 statements, and that they did, in fact, rely on those
3 statements, and they were damaged. I don't -- I see
4 that the cases are limited, but I don't see that
5 there's any reason within the holdings to limit them to
6 just RFRA cases. That's my point on that.

7 And I'll leave that and proceed just to the
8 fiduciary duty and the RICO claims, if that's okay,
9 Your Honor. Okay.

10 THE COURT: Thank you.

11 MS. BURNINGHAM: Thank you. First, the
12 breach of fiduciary duty. It's true that Franco did
13 hold that church leaders do not have a fiduciary duty,
14 but that was in the negligence context. We have not
15 pleaded negligence in the complaint. And, in fact, I
16 think there is a common law cause of action that if I'm
17 given leave to amend, I would draft it as a duty of
18 full disclosure.

19 And I think the two cases that come after
20 Franco, one was -- Franco was decided in March of 2001,
21 I believe. And the next case by the Supreme Court was
22 Mitchell, and it involved property, and I think it was
23 a swimming pool that had leaks, and it was
24 foundationally compromised. And even though the buyer
25 inspected the swimming pool reasonably, the seller was

1 held to have -- did not disclose the crack in the pool,
2 and they said the seller should have given full
3 disclosure to the buyer, and that was after Franco.

4 The next case was Yazd, and that was a
03:26PM 5 soils engineering report that was withheld from the
6 buyer by the seller. And Yazd iterated certain -- I
7 don't have those in front of me now, but certain types
8 of inequities between the two parties, such as
9 knowledge, education, one in a superior position to the
03:26PM 10 other. I have the list of them somewhere, but when
11 that happens, there's a duty of full disclosure. And
12 we also have a jury instruction that requires a duty of
13 full disclosure. And they cite -- and it's cited in my
14 brief, I believe.

03:26PM 15 But if you're going to speak on a matter,
16 and I think this applies to the church, if the church
17 is going to, in their correlated materials, say this is
18 -- Joseph Smith had plates and show him sitting at
19 plates and appearing to translate, they have to tell
03:26PM 20 the whole story. They have to give a full and fair
21 disclosure. They have to say that, well, most of the
22 records -- what they're saying now, most of the primary
23 source evidence says that he used a stone in the hat.
24 They can't just give a partial disclosure.

03:27PM 25 THE COURT: So I think you've just, in that

1 statement --

2 MS. BURNINGHAM: Yes.

3 THE COURT: -- raised at least three
4 separate issues in my mind. One is the existence of a
03:27PM 5 fiduciary duty. Am I not bound by the Supreme Court?

6 MS. BURNINGHAM: Yes.

7 THE COURT: And so, I mean, I think you're
8 advancing a good faith argument about expanding or
9 changing that law, but I'm the wrong -- I'm the wrong
03:27PM 10 court to do that, I think.

11 MS. BURNINGHAM: Yes, Your Honor. I would
12 withdraw my breach of fiduciary duty cause of action
13 and replace it with a breach of duty of full
14 disclosure.

03:27PM 15 THE COURT: So then let's talk about the
16 full disclosure. That arises, does it not, in Utah in
17 the context of commercial transactions? And you don't
18 have a duty to speak when you are dealing at arm's
19 length with someone, but if you do speak on a subject,
03:28PM 20 you have to speak in a manner and make whatever
21 disclosure is necessary not to make your disclosure
22 misleading, right?

23 MS. BURNINGHAM: Yes. It has historically
24 been interpreted that way, yes.

03:28PM 25 THE COURT: Yeah. Are you aware of any

1 application by Utah courts outside of the commercial
2 context?

3 MS. BURNINGHAM: I am not.

4 THE COURT: And I guess second is, what
03:28PM 5 limiting principle would apply here? I mean, let's
6 think for a moment about the -- let's talk about the
7 Catholic Church.

8 MS. BURNINGHAM: Mm-hmm.

9 THE COURT: How would we go about defining
03:28PM 10 the scope and subject matter of disclosures that are
11 required? Is the church required to make disclosures
12 about the inquisition, and what are those disclosures?
13 Or what about the sex abuse scandal in the church, if
14 the church at times have made disavows of it? Are
03:28PM 15 those different matters than doctrinal things? Is the
16 Catholic Church required to say we don't think it's
17 physiologically possible that Noah, two-by-two, brought
18 in two of everything on the planet and put them on a
19 boat? I mean, what's the limiting principle to that
03:29PM 20 concept in the context of religious theology?

21 MS. BURNINGHAM: That's a good question,
22 Your Honor, and I don't think it's a standard-of-care
23 type thing. It's once you have admitted that what you
24 taught was not true, you need to, you know, you need to
03:29PM 25 go ahead and tell the whole truth. I mean, that's not

1 a good answer, I have to admit.

2 THE COURT: I mean, how would we apply it
3 here? In the context of a contract about a pool or
4 building a structure on the Salt Flats, you know, if
03:29PM 5 you are in possession of information about the
6 foundation and the earth that you are going to build on
7 and you make a partial statement and it's false or is
8 false in context because you failed to provide the
9 additional information that would -- I mean, that's
03:29PM 10 just different than saying here is this entire
11 theological belief system, and we've made some
12 disclosures, and so now we have to say what?

13 MS. BURNINGHAM: See, this is where I go
14 back to facts versus beliefs. We don't have to
03:30PM 15 disclose the entire theological differences that some
16 Mormons are more liberal and they believe this or that,
17 and some are more fundamentally strict, no. We have to
18 disclose that we've had -- we can't hide evidence. We
19 can't hide the stone in our vault for 150 years. If we
03:30PM 20 -- if we know about it, we should talk about it. If
21 we're going to talk about how the Book of Mormon came
22 about, we can't just make up a fairytale.

23 THE COURT: Well, it's a claim that --
24 that's a fraud theory, I think, the one we're talking
03:30PM 25 about. In Utah, I think that's the fraud theory. It's

1 a material omission of a -- or an omission of a
2 material statement or something.

03:30PM 3 MS. BURNINGHAM: But, yes, I'm sorry. I
4 think it could be characterized as common law, Your
5 Honor, a common law duty to tell the whole truth once
6 you've spoken. And that's the thing, you don't have to
7 -- if you don't talk about it, then that's fine. But
8 if you make representations, you need to make a fair
9 and full disclosure. I'll go on, Your Honor, unless
03:31PM 10 you have another question about that.

11 THE COURT: I just -- no. I mean, this is
12 -- this may be our next conversation. I don't know.
13 We should have an amendment in front of us if we're
14 going to get to this, but I just don't understand what
03:31PM 15 that would be. So does the Catholic Church also
16 disclose that bushes don't ordinarily talk when they're
17 on fire? I mean, I just don't know what the limiting
18 principle is to the --

19 MS. BURNINGHAM: No, but if you knew
03:31PM 20 that --

21 THE COURT: There's not physiological proof
22 that the entire planet was flooded for 40 days.

23 MS. BURNINGHAM: Right. I understand that.
24 But if you knew that the bush in the fire story was
03:31PM 25 completely made up, you shouldn't talk about it.

1 THE COURT: Okay. Okay. I think you
2 wanted to speak also about one of your other claims.

3 MS. BURNINGHAM: Right. Just about the
4 RICO cause of action, Your Honor. For mail and wire
03:32PM 5 fraud you don't have to prove reliance, you don't have
6 to prove causation. You just have to show, under the
7 federal statute, that there was an intent to deceive,
8 and I think that that will easily be shown in this
9 case. There was an intent to deceive because now
03:32PM 10 they've revealed what they had hidden for so long.

11 And counsel has -- has continually said
12 that, well, RICO can't be applied in cases involving
13 religions. Well, that's not true. Just over the past
14 few years, there's been several cases filed against the
03:32PM 15 Catholic Church and, in fact, the Vatican in a DC
16 Circuit case in 2018. Just because it hasn't been done
17 or reported doesn't mean it can't be done. It has yet
18 to be done.

19 And counsel cites I believe it's
03:32PM 20 Wollersheim for some dicta, but there's no holding
21 that I know of that says that religious organizations
22 or purported religious organizations cannot be the
23 defendant in a civil RICO case or a criminal RICO case.
24 There's three attorneys general now that are
03:33PM 25 investigating whether or not they should prosecute the

1 Catholic Church under RICO, Virginia, I have the other
2 two on the tip of my tongue, but I don't have them in
3 front of me. I just don't think that's the law.

4 Michigan, Iowa, and Virginia AGs have gone on record.

03:34PM

5 THE COURT: I mean, I'm a little
6 handicapped in addressing the racketeering argument
7 that you just made. It's really not developed in the
8 papers. I know there's a great deal of law about the
9 elements of mail fraud and wire fraud, and they -- I
10 have in my mind that they apply differently sometimes
11 in the criminal context and in the civil context, and
12 I'm not convinced that the content of the communication
13 in a wire fraud or mail fraud has to be false. It just
14 has to be in furtherance of, but none of this is in the
15 papers. It's not briefed anywhere. There's an

03:34PM

16 objection to the enterprise and a general argument made
17 by the defendant, at least in the opening papers, that
18 it's just a rehashing of the fraud claim. And
19 including in your opposition, that's what I was just
20 studying, I don't -- I mean, nobody disputes that cash
21 is a --

03:35PM

22 MS. BURNINGHAM: Right.

23 THE COURT: I mean, we definitely are
24 talking about an enterprise, and you're arguing about
25 the passive enterprise in your papers, but the content

03:35PM

1 of the wire or mail, I don't know what to do with that.
2 What should I do with that in view of the briefing?

3 MS. BURNINGHAM: Your Honor, I would like
4 to have leave to amend, and I would -- I mean, I would
03:35PM 5 amend the RICO cause of action. I don't think -- I
6 think it was -- I think I can make it tighter, but I
7 don't think there is any case law that holds that a
8 religious organization cannot be a defendant or cannot
9 be part of an enterprise, and the lower levels of the
03:36PM 10 wards and the stakes, they're passive. And I just -- I
11 think it does fit. Just because it hasn't doesn't mean
12 it can't. And I don't think their objections that
13 they've taken are well taken. I just don't think that
14 they briefed it at all. I attempted to do it, and
03:36PM 15 perhaps I didn't do a good enough job. But I don't see
16 any law that says -- that holds that -- RICO's been
17 expanding as you, I'm sure, know in some ways.

18 THE COURT: Unfortunately.

19 MS. BURNINGHAM: But --

03:36PM 20 THE COURT: And I don't know how it applies
21 -- I mean, I don't -- I'm a little bit -- I'm candidly
22 a little bit confused about the racketeering theory
23 that you're advancing here. I mean, ordinarily --
24 often, let me say often the theory is that one or more
03:36PM 25 persons are controlling an otherwise lawful enterprise

1 for an unlawful purpose, using it as a vehicle to
2 perpetuate a crime largely is why it was started,
3 right?

4 But I don't know -- I don't even know how
03:37PM 5 it would apply over -- I think your allegations are
6 that, what, 130 years, I mean, who are the persons that
7 are directing the affairs of the enterprise? They're
8 every president and every apostle for 100 years and
9 they all are acting with a unity of purpose. I mean, I
03:37PM 10 just don't understand how that fits, but again, we're
11 outside the papers and probably talking about
12 allegations that will be in the next pleading, not in
13 this one.

14 MS. BURNINGHAM: I will be glad to address
03:37PM 15 that then. I can briefly make a statement.

16 THE COURT: I'd love to hear what you think
17 about it.

18 MS. BURNINGHAM: Okay. Your Honor, the
19 corporation, of course, is the defendant, COP, and it
03:37PM 20 only acts through its agents and in this case agent
21 leaders. The enterprise is an association, in fact, of
22 not only those agent leaders but the local leaders who
23 are -- and the missionaries who are unwitting members
24 of the enterprise.

03:38PM 25 THE COURT: Yeah. Okay. What else, if

1 anything, have we not touched on that you think is
2 important to our motion?

3 MS. BURNINGHAM: I just don't think -- the
4 only thing that I would say, Your Honor, is I don't
03:38PM 5 think that the First Amendment was ever meant to
6 insulate or immunize religious organizations from
7 crimes or torts that affect the public. Thank you.

8 THE COURT: Thank you.

9 Mr. Jordan, you don't disagree with that
03:38PM 10 last point?

11 MR. JORDAN: I do not disagree with that
12 last point as I made clear. If an organization,
13 whether religious or not, makes false representations
14 about purely secular matters, they can be held to
03:39PM 15 account to the law, including the laws of fraud. So I
16 think that idea runs clearly through all of the cases.

17 Let me try to briefly sum up where I think
18 we are. Maybe just a word about the United States vs.
19 Rasheed case which has been cited by Ms. Burningham.

03:39PM 20 The problem for the defendants in that case is that
21 they made representations about purely secular facts.
22 And Your Honor will remember that the facts of that
23 case are that, and I quote: "At the outset of the
24 program, Rasheed represented to his ministers and to
03:39PM 25 potential ministers that the increases of God were

1 gifts from the church to ministers derived from profits
2 that the church made from its foreign investments in
3 gold, diamonds, and oil."

4 And in combination with that, what they --
03:40PM 5 of course the Court goes on to say: "There is no
6 evidence that any such foreign investments ever
7 existed."

8 Well, if you say, "Give me your money, I'll
9 pay you back from the foreign investments I have in
03:40PM 10 gold, diamonds, and oil," and what you don't tell them
11 is that the payments were coming solely from the
12 donations of other members, you're just running a Ponzi
13 scheme. If you say, "I have foreign investments in
14 gold, diamonds, and oil, and I'll pay you back from
03:40PM 15 those investments," and you're really just paying them
16 back from the money that you get from the next set of
17 investors/donors, you're making representations about a
18 purely secular matter. There's nothing different or
19 unusual about United States vs. Rasheed. It just falls
03:41PM 20 perfectly into the pattern that we see in Bryce and the
21 other cases.

22 THE COURT: But if a defendant in that case
23 said, "And I make investments on Wall Street with the
24 advice and divine inspiration of God," then what?

03:41PM 25 MR. JORDAN: Well, in your hypothetical, if

1 the minister said, "Give me your money because I
2 believe that I'm such a righteous person that God will
3 help me to invest this money wisely" and he invests it
4 in some stock that crashes, he's not going to be held
5 to account for that.

6 If he actually made the investment and it
7 didn't work out well, he lost the money, but he's not
8 -- he's not perpetuating a fraud. If I tell you, "I
9 have investments in diamond mines in Zimbabwe, and I'll
10 pay you back the money that you donate to me with
11 interest and no penalty for withdrawal from those
12 investments in the Zimbabwe gold mine" and there is no
13 Zimbabwe investment and I just get the money from the
14 next investor/donor to give to you, that's just a Ponzi
15 scheme.

16 THE COURT: But you're reverting back to
17 the easier case. I mean, the harder case is the one
18 where you make a misrepresentation concerning God's
19 involvement in the performance of the funds that you
20 obtained. And I guess you would say, what, then, in
21 that instance? Would we investigate whether that was a
22 genuinely held belief by the person who makes the
23 statement?

24 MR. JORDAN: No, I don't think we would. I
25 think we would look at whether it's a statement about a

1 religious matter as opposed to a secular matter. God
2 is -- God is directing my investment strategy. That's
3 a purely religious matter.

4 THE COURT: What about --

03:43PM 5 MR. JORDAN: It's a hard case on the facts
6 obviously but still.

7 THE COURT: What about -- I'm trying to
8 pick the right historical example. I don't know if
9 it -- I mean, Koresh, or what about -- who is the --
10 who is the man with the Kool-Aid?

11 MR. JORDAN: Excuse me. The who?

12 THE COURT: The man with the Kool-Aid.

13 MS. BURNINGHAM: Jones.

14 MR. JORDAN: Oh, Jim Jones.

03:43PM 15 THE COURT: Jim Jones. Not a problem,
16 right? God told me we should all kill our children and
17 kill each other. There's nothing to see here because I
18 say that it's divine inspiration from God. That's an
19 extreme example, but --

03:44PM 20 MR. JORDAN: It is an extreme example but
21 one with which the courts have dealt, including the
22 U.S. Supreme Court. There is a distinction drawn
23 between the preaching of religious beliefs and certain
24 actions that you advocate on the basis of those
03:44PM 25 religious beliefs.

1 So I might, in fact, have a religious
2 belief that we should execute people of a certain
3 philosophy that is different from our own, but the
4 courts distinguish that and say that's not within the
03:44PM 5 First Amendment. There is a -- there is a conduct
6 versus extreme action distinction that runs through the
7 law. But the courts are very, very careful to say the
8 kinds of actions we're talking about are not preaching
9 and teaching. That's part of what the First Amendment
03:45PM 10 guarantees.

11 THE COURT: Well, what about -- what about
12 inducements to act like in the form of paying tithing?
13 So if that's based on representations about God's plan
14 and divinity and 10 percent as opposed to executing
03:45PM 15 someone who proselytizes a different position, how is
16 that different, do you think?

17 MR. JORDAN: I think it's completely
18 different because in the one case, I kill you. In the
19 other case, I say to you, "God will bless you if you
03:45PM 20 pay tithing," and then the individual chooses for
21 themselves whether they believe that teaching and
22 whether they choose to act on it. My right to preach
23 and proselytize and tell you what I think will bring
24 the blessings of God upon you is absolutely protected
03:46PM 25 by the First Amendment.

1 THE COURT: What about -- what if the
2 statement is, "God will bless you if you abduct
3 children under the age of ten and you deliver them to
4 our church"?

03:46PM 5 MR. JORDAN: I think there you've crossed a
6 line that the courts would not struggle too hard with.
7 We actually have a case like that in -- in one of the
8 supplemental authorities that's cited by the defendant.
9 And that particular supplemental authority was sort of
03:46PM 10 an extreme sect of Judaism that -- it's the U.S. vs.
11 Stimler case. It comes out of the Third Circuit. A
12 certain ultra-Orthodox Jewish sect that practices
13 what's called "gettin," and in gettin, as I understand
14 it from the case and don't obviously claim to be an
03:47PM 15 authority on it, one could use -- could require someone
16 else to sign a divorce decree.

17 And what was done in that case, and of
18 course it's a criminal case, is they kidnapped the
19 person in order to get them to sign this divorce
03:47PM 20 decree. Well, the Court didn't have too much problem
21 with that because the Court says kidnapping is not
22 preaching. Inciting to kidnap is a long stretch away
23 from religious belief, and I think that's where you're
24 going. And there they found that the government had a
03:47PM 25 compelling interest to require people not to kidnap.

1 So I'm the first to acknowledge that you
2 can posit hypotheticals where people may be encouraged
3 by someone else's religious views to commit the
4 criminal act of kidnapping or murder or whatever it
5 might be. But that's so far away from what the Supreme
6 Court has said about protecting people's right to teach
7 and believe what they choose to believe.

8 Which takes me, I think, to the whole
9 concept of what seems to be indicated here as a desire
10 to amend the complaint. And as I understand what Ms.
11 Burningham is saying, she wants to amend to say a
12 little bit more about the insincerity of belief. That
13 is going to take us nowhere, and I would encourage the
14 Court not to indulge her in that course.

15 THE COURT: This is going to be a difficult
16 argument for you to make today. This is not unique to
17 this case. I don't know how we can begin to assess the
18 futility of a claim that we don't have before us and
19 proposed amendments we haven't yet seen. Rule 15 is
20 one thing, and then what the circuit has said about it
21 is all together another. We can't even begin to assess
22 the application of Rule 15 unless or until we see what
23 is proposed, can we?

24 MR. JORDAN: Well, I think she's told us
25 enough about it, but if you need to see it in writing

1 and you feel compelled to allow her to put it in
2 writing, let me just put this stake in the ground for
3 future reference. Because let's remember here that
4 we're putting people to real expense to resist claims
5 that ultimately cannot go anywhere. There is no
6 allegation she can make in good faith that would be
7 consistent with Rule 11 that would get her anywhere on
8 the subject of sincerity of belief because the whole
9 inquiry is fraught.

03:50PM 10 I'm quoting now from the Presbyterian
11 Church in U.S. vs. Mary Elizabeth Blue Hull, United
12 States Supreme Court 1969. Here's what it says,
13 engaging in just the kind of inquiry that she is
14 encouraging, "A civil court can make this determination
03:50PM 15 only after assessing the relative significance to the
16 religion of the tenants from which departure was found.
17 Thus, the 'departure from doctrine' element of the
18 Georgia implied trust theory requires the civil court
19 to determine matters at the very core of a religion,
03:51PM 20 the interpretation of particular church doctrines and
21 the importance of those doctrines to the religion.
22 Plainly, the First Amendment forbids civil courts from
23 playing such a role."

24 You may remember, Your Honor, that the Mary
03:51PM 25 Elizabeth Blue Hull case was one where two -- two

1 different denominations of the same religion who owned
2 property in common had separated from each other. And
3 Georgia had a very unfortunate statute for determining
4 who ought to get the property. It was called "the
5 departure from doctrine" statute. So the Court was
6 being called upon to decide who had departed more from
7 the original doctrine of the mother church, which
8 faction had a more orthodox view of whatever the
9 original doctrine was determined to be.

03:51PM
10 And the Supreme Court said we're not going
11 there. We're not engaging in whether this particular
12 belief is core or fundamental or which parts of the
13 church believe in this or don't believe in that. It's
14 all a matter of religious doctrine, and we're not
03:52PM
15 wading into those waters at all.

16 And in the same vein, of course, I
17 mentioned it before, is the NLRB vs. Catholic Bishop of
18 Chicago case, Supreme Court 1979, where the Court said
19 this: "The Court observed that in those cases the
03:52PM
20 schools had responded that their challenged actions
21 were mandated by their religious creeds. The
22 resolution of such changes by the board, in many
23 instances, will necessarily involve inquiry into the
24 good faith of the position asserted by the
03:53PM
25 clergy-administrators and its relationship to the

1 school's religious mission. It is not only the
2 conclusions that may be reached by the board which may
3 impinge on the rights guaranteed by the religion
4 clauses, but also the very process of inquiry leading
5 to findings and conclusions."

6 What -- what Ms. Burningham seems to be
7 suggesting here is that we'll start taking depositions
8 of church leaders to inquire into the sincerity of
9 their beliefs.

10 THE COURT: Mr. Jordan, I don't know how to
11 apply that case law that you just cited me to claims
12 that aren't yet drafted or drawn or placed before the
13 Court. I just don't even know where to begin that
14 process. You --

15 MR. JORDAN: As I say --

16 THE COURT: You may be constructing a
17 fence, but it's not one that I can utilize today.

18 MR. JORDAN: I hear you, Your Honor. I'm
19 -- I'm laying down a fence, as you say, because this
20 plaintiff is wasting other people's time and money in a
21 frivolous pursuit of something which cannot be fairly
22 alleged under the laws of this --

23 THE COURT: So that's a different question
24 than we have before us today. There's Rule 12.

25 There's Rule 15. There's Rule 11. There are different

1 rules, and I don't have any Rule 11 issues in front of
2 me, nor do I -- nor could I assess any Rule 11 issues
3 in context of a complaint that isn't yet drawn. I
4 understand what you're saying to me, but, of course, it
03:54PM 5 could just as easily be included in a letter to Ms.
6 Burningham when you receive a draft, if you do.

7 MR. JORDAN: I take Your Honor's point, and
8 I know Your Honor understands I'm just trying to put a
9 stake in the ground here today.

03:54PM 10 THE COURT: We also need to ensure the
11 availability of these forums to our citizens to
12 adjudicate important disputes in whatever way these
13 issues are resolved. This is clearly an important
14 dispute and one of great interest to everybody here,
03:55PM 15 including the defendants. I understand that. And I
16 understand that there's expense involved with
17 evaluating and responding to a complaint, and that's
18 true in every case in this court.

19 MR. JORDAN: I'll conclude with this final
03:55PM 20 thought, Your Honor. I think from the very first case
21 Your Honor mentioned, the Bryce case, we have it as
22 clearly as we could have it that all of this analysis
23 turns on one thing. Are we dealing with matters that
24 are religious in nature, or are we dealing with matters
03:55PM 25 that are wholly secular in nature?

1 To me, that could not be more obvious from
2 this complaint. As Your Honor well knows, the first
3 element of any fraud claim is that the claims are
4 untrue, and that is a question which can never be
5 reached by a court when it comes to matters of
6 religion. And so no matter how we spin, we will come
7 to the same constitutional dead-end for these cases.

8 And on that I will just conclude with the
9 quote Your Honor has already mentioned from Ballard:
10 "Men may believe what they cannot prove. They may not
11 be put to the proof of their religious doctrines or
12 belief."

13 Thank you, Your Honor.

14 THE COURT: Thank you.

15 Ms. Burningham, the last word, if you wish.
16 Anything more to add? No?

17 MS. BURNINGHAM: Just one second, Your
18 Honor.

19 THE COURT: Of course.

20 MS. BURNINGHAM: One moment maybe. Just
21 two minutes, Your Honor. I would just say that we're
22 in a day of fake news and false facts. And the
23 defendant has admitted that certain things are not
24 true; that its scripture doesn't have anything to do
25 with Abraham. That's a different case than having you

1 decide what's true and what's not. Thank you, Your
2 Honor.

3 THE COURT: Thanks to both of you. As I
4 said, we'll take this under advisement, and an order
5 will be forthcoming. Thank you.

6 (Whereupon, court proceedings were concluded.)
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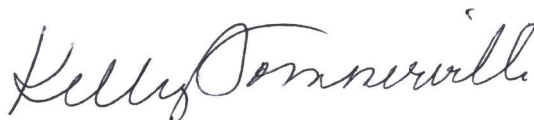
REPORTER'S CERTIFICATE

I, Kelly Sommerville, a Registered Professional Reporter in and for the State of Utah, do hereby certify:

I attended the hearing of the foregoing matter on February 13, 2020, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewritten form; and the foregoing pages numbered from 3 through 85 constitute a full, true and correct report of the same;

I further certify that I am not of kin or otherwise associated with any of the parties of said cause of action and that I am not interested in the outcome of the matter;

And hereby set my hand this 25th day of January, 2021.

A handwritten signature in cursive script that reads "Kelly Sommerville".

Kelly Sommerville, RPR, FCRR